

1611532 (Migration) [2016] AATA 4729 (23 November 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Muhua Jiang
CASE NUMBER:	1611532
DIBP REFERENCE(S):	CLF2012/75483
MEMBER:	Michael Cooke
DATE:	23 November 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221 of Schedule 2 to the Regulations • r.2.03A

Statement made on 23 November 2016 at 11:15am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 November 2014 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 11 April 2012 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because at time of decision the parties did not meet the definition of de facto partners.
4. The matter is before the Tribunal following Federal Circuit Court orders remitting the decision to the Tribunal requiring the Tribunal to reconsider the matter.
5. The applicant appeared before the Tribunal on 22 November 2016 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and four supporters of the parties. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
6. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether, at the time of this decision, the applicant is the de facto partner of the sponsoring partner.

SPOUSE/DEFACTO (cl.801.221(2))

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

9. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian permanent resident and was identified in the related Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

10. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
11. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
 - Financial aspects of the relationship – including joint ownership of assets, and joint liabilities; extent of pooling of financial resources, any legal obligations owed to the other party; any sharing of day-to-day household expenses.
12. The parties have provided extensive written and oral evidence of financial pooling and sharing of expenses. This includes mortgage payments.
 - Nature of the household – including any joint responsibility for care and support of children, parties' living arrangements; and any sharing of housework.
13. The parties own their own house and share a pet cat they have owned since 2010. They gave oral evidence that they share housework relative to each other's particular skills.
 - Social aspects of the relationship – including whether parties represent themselves to other people as being in a de facto relationship with each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
14. The parties represent themselves to other people as being in a de facto relationship with each other and have been together since 2011. The opinion of friends and acquaintances about the nature of the relationship (as given in oral evidence) has reinforced this aspect of their relationship. Both sides of their families support the relationship. They have jointly visited both families in China and the applicant's mother has stayed with them in Sydney. They have provided photographic evidence of their lives together.
 - Nature of persons' commitment to each other - including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
15. The evidence submitted to the Tribunal indicates a long-standing and deep commitment between the parties. They both come from very different areas of China and fell in love in Australia. They have successfully made a relationship and given each other emotional support when dealing with the intricacies of Chinese cultural familial expectations. They, like many young Chinese are products of the "One Child Policy" so they have coped with the high expectations of their parents. They have travelled together extensively and they see the relationship as long-term.
 - Whether the parties are related by family
16. The parties are not related by family.

- Any other relevant considerations

17. The Tribunal has extensively questioned the parties regarding adverse findings of both the delegate and Tribunal (previously constituted) and is satisfied that the parties have rebutted the findings. The Tribunal has also had the benefit of copious additional information submitted by the parties' representative.
18. The Tribunal has considered r.1.09A(3) matters and finds that the parties have a mutual commitment to a shared life to the exclusion of others; a genuine and continuing relationship; and they live together and not separately and apart on a permanent basis. The satisfy the definition of de facto partner in s.5CB(2)(a)-(c) of the Act.
19. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of decision. Therefore, the applicant meets cl.801.221(2)(c).

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

20. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the visa applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
 - the parties' age at time of application
21. The parties were both aged over 18 at time of application
 - if both were at least 18 years old:
 - whether the relationship existed for at least 12 months before the visa application (or if exempted by r.2.03A(4),(5));
22. The relationship existed for at least 12 months before the visa application
23. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
24. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

25. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
- cl.801.221 of Schedule 2 to the Regulations.
 - r.2.03A

Michael Cooke

Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).